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FROM R.G.O. FBKS

MEMORANDUM State of Alaska

ATTORNEY/CLERK

COMMUNICATION

TO: Dennis Kelso, Commissioner
Department of Environmental
Conservation

FILE NO:

June 3, 1987

TELEPHONE NO:

452-1568

FROM: GRACE BERG SCHAIBLE
Attorney General

SUBJECT: MAPCO Compliance
Order criticisms

By: 
Paul R. Lyle
Assistant Attorney General

The Ombudsman's May 22, 1987 preliminary report and May 21, 1987 investigative memorandum (hereinafter the "report") criticize numerous aspects of the December 18, 1986 Compliance Order by Consent between DEC and MAPCO Petroleum, Inc. (hereinafter "MAPCO"). As discussed below, the report's criticisms are unjustified and evidence a serious misunderstanding of the consent order's design, scope, and purpose.

Compliance orders by consent constitute DEC's primary non-litigation mechanism for resolving serious environmental problems. DEC's regulations specifically authorize the use of consent orders. See 18 AAC 95.160. If consent orders were unavailable, DEC would be forced to litigate, through court actions or formal compliance order proceedings, all major enforcement actions taken by the Department.

In the present case, DEC's decision to pursue a consent order was a reasonable one. Litigation would have been expensive and time consuming. During pendency of the litigation, the oil spill problems dealt with in the consent order may have remained unresolved. In addition, as the report noted, problems exist with respect to DEC's past documentation of violations and past delays in initiating formal enforcement action. Such problems complicate litigation and reduce the chances of success in court. Under the circumstances of this case, DEC's determination that the need for prompt and proper curative action outweighed any benefits which might have resulted from prolonged litigation was reasonable.

The federal government and numerous states utilize consent orders as primary enforcement tools. DEC's use of a consent order, in lieu of immediate litigation, ensures prompt corrective action and is consistent with the enforcement practices of DEC, other states, and the federal government.

The compliance order is a complex legal document. In order to understand what the compliance order requires, how the order functions, and what options the order provides DEC, one

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must read the document's numerous provisions together and must analyze each provision in terms of DEC's overall statutory authority. The report's substantive criticisms result from a selective and unintegrated reading of the consent order. A careful reading of the consent order demonstrates that the report's criticisms are unjustified.

I. The Consent Order does not forfeit DEC's right to enforce violations of Title 46 or to seek penalties.

The consent order was designed to achieve prompt removal of spilled petroleum product from the ground at MAPCO's sole expense. To ensure proper and timely remedial action, the consent order imposes specific substantive requirements and deadlines upon MAPCO.

If MAPCO fails to comply with any substantive requirement or deadline set forth in the consent order, DEC retains full authority to take any legal action necessary to enforce the consent order and to seek penalties for the order's violation. Paragraph 4 of the consent order states that "any deviation from the terms or deadlines set forth herein may result in prompt legal action to enforce the terms and deadlines herein set forth." Paragraph 8 provides that "the state further expressly reserves the right to initiate administrative or legal proceedings in the event that the respondent does not comply with the terms or deadlines set forth or incorporated herein to the reasonable satisfaction of the state."

Although DEC agreed not to impose fines for the narrow range of past violations described in the consent order, that agreement is conditioned upon MAPCO's compliance with all substantive requirements and deadlines in the consent order. In fact, the consent order actually enhances DEC's ability to enforce clean-up requirements and to assess civil and criminal penalties with respect to the violations dealt with in the consent order. Under Paragraph 10, the consent order "constitutes an order of [DEC] for the purposes of AS 46.03.760, AS 46.03.765, AS 46.03.790, and for all other purposes." AS 46.03.760, .765, and .790 authorize, respectively, civil penalties, injunctive relief, and criminal penalties for violation of DEC orders. Paragraph 3 expressly recognizes DEC's broad right to pursue penalties for consent order violations. Paragraph 3 states that "nothing herein shall be construed as limiting DEC's right to seek impositions of fines for violation of the terms and conditions of this [consent] Order." Thus, if MAPCO fails to strictly comply with the consent order's requirements, DEC need only prove a violation of the consent

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order's terms in order to obtain penalties and injunctive relief. DEC need not prove the underlying statutory violations which gave rise to the consent order. The consent order thus enables DEC to take rapid and effective legal action against MAPCO if MAPCO violates any consent order requirement. Absent the consent order, such legal action would be much more difficult and time consuming. DEC's enforcement strategy in this case was to focus MAPCO's time and financial resources in cleaning up spilled oil. The consent order holds easily obtainable civil penalties over MAPCO's head to provide incentive for timely and effective resolution of the environmental problems dealt with in the consent order.

The report implies that DEC, by entering into the consent order, forfeited the opportunity to take legal action against MAPCO for a wide variety of Title 46 violations. This incorrect implication derives from an erroneous interpretation of the "promise to refrain from legal action" provision of paragraph 3. The report ignores the fact that the paragraph 3 provision is limited by the paragraph 8 "reservation of rights" provisions.

Paragraph 8 expressly recognizes DEC's right to take legal action for any violation "not arising out of the facts, actions, or inactions giving rise to this consent order." Thus, DEC is free to take legal action against MAPCO for all past violations not specifically related to the oil spills described in paragraph 2. In addition, paragraph 8 affirms DEC's right to take legal action for "any violation which occurs after the date this consent order is executed by MAPCO." Thus, DEC is free to take legal action against any violations which occur after December 10, 1986. The above provisions make clear that DEC's "promise to refrain from legal action" applies only to a narrow range of oil spill violations covered by the consent order. However, even if the violation falls within the narrow range of violations covered by the consent order, another paragraph 8 "escape clause" provision allows DEC to take legal action in certain circumstances:

In addition, DEC and the Department of Law expressly reserve the right to initiate further administrative or legal proceedings related to violations described and dealt with in this Compliance Order or arising out of any facts, actions, or inaction giving rise to this Compliance Order, if, in DEC's opinion, subsequent events are conditions create a public health hazard requiring immediate corrective or ameliorative action, whether or not DEC may have

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been able to discover the event or condition prior to entering into the Compliance Order.

The paragraph 8 reservation of rights provisions ensure that, except in a narrowly defined area, DEC has not given up the right to take legal action and to obtain damages and penalties. For example, under the paragraph 8 provisions, DEC remains free to initiate legal action against MAPCO for groundwater pollution and for benzene drinking water contamination. The report's implication that DEC forfeited the right to take such legal actions is incorrect.

II. DEC has not forfeited its right to financial compensation.

In the consent order, DEC agreed not to seek recovery of costs incurred by DEC in supervising MAPCO's compliance with the consent order provisions and in investigating past oil spills at the refinery. Under the consent order, MAPCO, not DEC, must pay for the cleanup activities and for other consent order requirements. The costs "forgiven" by DEC are minimal when compared to the total cleanup costs. In return for "forgiving" minimal supervisory and past investigation costs, DEC has obtained a prompt and effective oil spill cleanup, an environmental audit, and a commitment to conduct subsequent curative action at virtually no cost to the state. Given the need for a rapid cleanup, and given the limited money available in the state Oil Hazardous Substance Release Response Fund, DEC's decision was quite reasonable. Of course, as with other types of legal actions, the paragraph 8 reservation of rights provisions preserve DEC's right to initiate legal action for cost recovery in the vast majority of circumstances.

III. DEC has not forfeited control over the cleanup process.

In the consent order, DEC retains supervisory control over all aspects of the cleanup operation. For example, under paragraph 3(a)(ii) DEC may specify the number, location, and construction of oil collection wells. Under paragraph 3(a)(iv), MAPCO must keep daily logs for all collection wells and make the logs available upon demand. Similar provisions exist for monitoring wells under paragraph 3(b). Under paragraph 3(b)(ii), DEC may order MAPCO to take whatever corrective measures DEC determines are necessary to ensure recovery of petroleum products found in the monitoring wells. Under paragraph 3(c) MAPCO must test all refinery drinking water wells for purgable aromatics and

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must submit all drinking water supply test results to DEC each month. Under paragraph 3(d) MAPCO must obtain prior DEC approval for disposal of contaminated materials which result from waste waster holding pond expansion. In short, every significant phase of the cleanup operations is subject to strict DEC supervision.

Despite the consent order's stringent oversight provisions, the report objects to the consent order's requirement that MAPCO, rather than DEC, must conduct the cleanup. The report's criticism evidences a lack of understanding concerning the manner in which government entities manage environmental cleanups. States and the federal government routinely require violators to conduct cleanup operations subject to government supervision. DEC, and other government entities, lack the time, personnel, and money to conduct their own cleanup efforts. Government sponsored cleanups are used only as a last resort after all efforts to force the violator to cleanup the site have failed. Contrary to the report's assertions, forcing a violator to cleanup the violator's own mess at the violator's own expense does not create a "conflict of interest." Rather, given DEC's limited resources, such an approach is the only feasible means for obtaining a prompt and proper cleanup. Briefly stated, the consent order is structured to force MAPCO to cleanup and correct past violations at its own expense while DEC supervises and controls the process.

The report's criticism of the consent order's environmental audit requirement is also in error. Environmental audits are state-of-the-art environmental enforcement tools. The environmental audit requirement forces the violator to examine and correct environmental deficiencies which might otherwise go undetected. The audit is performed by an independent consultant acceptable to DEC. The mere fact that MAPCO, rather than DEC, pays for the audit does not create a "conflict of interest." DEC retains authority to approve the independent consultant and to approve the environmental audit's scope of work. The consent order requires the consultant to be an independent contractor. As an independent contractor, the consulting firm's livelihood is not dependent upon MAPCO and is not subject to MAPCO's management oversight. In addition, the firm's interest in maintaining a high professional reputation in its field is a strong incentive to assure a factually correct and thorough review of MAPCO's operations. MAPCO must correct all deficiencies noted in the final environmental audit report within one year after DEC receives the final audit report. The consent order further provides that the audit must comply with the requirements set forth in the EPA Environmental Auditing Policy Statement, 51 Fed. Reg. 25004-01 (June 9, 1986). The consent order's environmental audit provision constitutes an innovative mechanism for

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identifying and correcting environmental deficiencies. The audit provision is designed to address and correct the problems that lead to spills rather than leaving to chance that spills will continue unabated at the refinery in the future. As with any new enforcement tool, DEC will inevitably refine the environmental audit process over time. The report's condemnation of the environmental audit process, absent any indication that the new technique will not prove successful, is unjustified.

PRL/mjf

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PLEASE DELIVER THE FOLLOWING PAGES TO:

NAME: Kelso/Kyla

LOCATION: DEC Comm. Off PHONE NUMBER: 465-2600

TELECOPIER NUMBER: 586-1354

REMARKS: Here's the legal analysis you requested.

(quick work or huh??) Let me know if you
need anything else. Paula's comments to APRN were based
on the conclusions set forth in the memo.

TOTAL NUMBER OF PAGES 2 INCLUDING THIS COVER LETTER.

DATE: June 3, 1987 TIME: 3:15 pm

FROM: McDonagh

IN RE SUBJECT/FILE NO. MARCO Dmk. Criticism

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